

*Off to distribute* (Burch)  
*Chompson*  
*Boul*

**LAW LIBRARY**  
**ARIZONA ATTORNEY GENERAL**

*No RELEASE*

September 2, 1953  
Letter Opinion No. 53-103-L

A. H. Wolff, M. D.  
Clinical Director  
Arizona State Hospital  
Phoenix, Arizona

Re: Consent to Surgery on Inmates

Dear Doctor Wolff:

This is in reply to your letter of August 18, 1953, and our related conversations in which were raised certain questions that I have reduced to the following five:

1. Must consent be obtained for "minor operations" on an inmate of the State Hospital?
2. If such inmate has no relatives, who can give the necessary consent?
3. Is the consent required to be notarized?
4. Is a consent in general terms sufficient or must it be specific?
5. In the event of an inmate's death, when there is no next of kin, who may give the required authorization for an autopsy?

1. The general rule as to the consent necessary for surgical operations is set out in 70 C.J.S. Physicians and Surgeons, 967,

"Where a patient is in possession of his faculties and in such physical health as to be able to consult about his condition, and no emergency exists making it impracticable to confer with him, his consent is a prerequisite to a surgical operation by his physician; and a physician or surgeon who performs an operation without his patient's consent, express or implied, is liable in damages. In the absence of an emergency a surgeon may not perform an operation different in kind from that for which consent was given or an operation involving risks and results not contemplated. The fact that the unauthorized operation was performed with skill

and care does not relieve the surgeon from liability, but, where the particular operation is not clearly unauthorized, the conduct of the operation with skill and care, and with beneficial results, may relieve the surgeon from liability.

The patient's consent may be implied from circumstances; thus, if he voluntarily submits to an operation, his consent will be presumed unless he was the victim of false and fraudulent misrepresentations. Consent to the performance of an operation is not valid if it is obtained by representations which are false to the knowledge of the surgeon. A consent given to a hospital for the benefit of the surgeon is sufficient to authorize an operation by the surgeon. If the patient is for any reason not competent to consent, the consent of someone who, under the circumstances, would be legally authorized to give it may be obtained.

For other expressions of this rule see PHYSICIANS AND DENTISTS BUREAU v. DRAY, et al. (1941. Wash.) 111 P. 2d, 568; IN RE HUDSON (1942 Wash.) 126 P. 2d 765, dealing with consent of parents for operation on child; and ROLATER v. STRAIN (1913 Okla.) 137 P. 96.

It will be noted that the above rule sets out generally the rights of prospective surgery patients which must be considered. The cases dealing with this subject make no distinction as to "minor operations" and it is our opinion that for complete protection consent should be obtained for all surgery.

2. Since consent must be granted before any surgery may be performed on an inmate, the question then arises: Who must give such consent? Assuming the patient has no relation legally authorized to give such consent, it is our opinion that the incompetent's guardian is the person authorized to agree to the proposed surgery. If the patient in question has no guardian it will be necessary, in order to comply with the requirements of the general rule above stated, to petition the court for the appointment of a guardian.

3. Arizona has no statute requiring authorization for the performance of surgery to be notarized and there is no common law rule to that effect. In the absence of such restriction, we feel it unnecessary that such authorization be notarized.

4. We find no statutory or case law deciding the question as to whether a consent must be specific or in general terms. The cases which deal with this point arise when, for example, a patient agrees to a particular operation and during surgery the surgeon locates a new malady and corrects same without consulting the

patient. It is our opinion that the consent forms should be in specific terms with an additional clause, such as "the physician is further authorized to correct any related defect discovered during surgery".

5. The general rule relative to the performance of autopsies is set forth in 15 Am. Jur., Dead Bodies, 847, which provides as follows:

"§27. Autopsies.--It may be stated as a general rule that where an autopsy is performed without the consent of those who have the quasi right of property in the corpse, the person performing the autopsy or the one responsible therefor is liable in damages, and an action for such damages, brought by a father, will not fail on the ground that there is no property in a dead body. On the other hand, where consent to an autopsy is given generally by the party who is entitled to the body, there is no liability for performing the same in the approved and usual manner."

The performance of autopsies in Arizona on deceased persons who have died in state institutions and who have left no relatives is governed by Sections 68-316 to 68-322, A.C.A. 1939, as amended.

Section 68-316, A.C.A. 1939, as amended, reads as follows:

"68-316. (Anatomy board)--Creation of board--  
Purpose.--The anatomy board of Arizona is hereby created for the purpose of distributing certain dead human bodies as hereinafter described to qualified institutions and persons hereinafter named to be used for the promotion and furtherance of the science and art of medicine and dentistry."  
(Emphasis supplied) ✓

Section 68-318, A.C.A. 1939, as amended, provides:

"68-318. Duty to notify and deliver.--It shall be the duty of every public officer, agent and servant of the state, and of every county, city and town, and every public institution supported in whole or in part at public expense, having in his or its possession the dead human body of ✓

any person for burial at public expense to notify the board within twenty-four (24) hours after receipt thereof, and upon instruction from the board, to deliver such body without fee or reward to the institution or person designated by the board."

Section 68-319, A.C.A. 1939, as amended, provides: ✓

"68-319. Exceptions.--This act (SS 68-316--68-322) shall not apply to dead bodies of persons who have died with smallpox, diphtheria or scarlet fever. Nor shall this act apply if the deceased person during his last illness, without suggestion or solicitation requested to be buried or cremated; or if within twenty-four (24) hours or the time before actual delivery, whichever be the longer, any person claiming to be and satisfying the officer in charge of such body that he is of kindred or is related by marriage to the deceased or a duly authorized representative thereof shall claim the said body for burial or cremation or request in writing that it be buried at public expense, or if within the time specified above any person claiming to be and satisfying the officer in charge of such body that he is a friend of the deceased, arranges to have the same properly buried or cremated without public expense.

Nothing in this act shall be construed to prevent any hospital, duly incorporated college or university or any duly licensed physician, surgeon or dentist from acquiring by gift or otherwise from persons having lawful authority to dispose of the same the dead body of any human being for the purpose of post mortem examinations, dissection or other scientific use."

The above sections must be read in conjunction with Section 43-5202, A.C.A. 1939, which provides as follows:

"43-5202. Person obligated to bury--Failure--Custody of body.--If a deceased person was married, the duty of burial devolves upon the surviving spouse; if the deceased was ✓

not married but left any kindred, the duty devolves upon the persons in the same degree, nearest of kin to the deceased, being of adult age, and within the state, and possessed of sufficient means to defray the necessary expenses; otherwise, the duty devolves upon the coroner conducting an inquest upon the body of the deceased, if any such inquest is held; if there is none, then upon the person charged with the support of the poor in the locality in which the death occurs. If the person, upon whom the duty of burial is cast omits to make such burial within a reasonable time, the duty devolves upon the person next specified; and if all omit to act, it devolves upon the tenant; or if there is no tenant, upon the owner of the premises or master; or if there is no master, upon the owner of the vessel in which the death occurs or the body is found.

Every person upon whom such duty is imposed who omits to perform that duty within a reasonable time, is guilty of a misdemeanor; and in addition to the punishment prescribed therefor, is liable to pay to the person performing the duty in his stead, treble the expenses incurred by the latter in making the burial, to be recovered in a civil action."

The statute above cited must be followed in determining which fall under the classification set forth in Section 68-318, supra, of "persons for burial at public expense".

An analysis of these provisions reveals that the procedure in dealing with deceased inmates is as follows:

(a) Ascertain whether the deceased has any relatives or next of kin so as not to fall under the phrase "person for burial at public expense".

(b) In the event that no relatives are located, notify the Anatomy Board that an inmate has died at the Hospital, leaving no known relatives.

(c) Request that the Anatomy Board leave the body at the State Hospital for purpose of an autopsy. The Board, by so

A. H. Wolff, M. D.  
Arizona State Hospital

September 2, 1953  
Page Six

doing, determines that such autopsy or post-mortem falls within the language of Section 63-316, supra, "promotion and furtherance of the science and the art of medicine and dentistry".

The procedure above outlined is not applicable to an inmate who dies leaving known relatives who wish to bury him. In that case consent of the spouse or next of kin is a prerequisite to the performance of an autopsy.

This office hopes this explanation satisfactorily clears up the questions raised by you in our conversations and correspondence. If we can be of any further service, please do not hesitate to call upon us.

Yours very truly,

ROBERT W. PICKRELL  
Assistant to the  
Attorney General

RWP:RM  
cc: R. A. Clelland